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Informal cooperation among competition agencies in specific cases

Note by the UNCTAD secretariat

Executive summary

This report reviews existing informal cooperation arrangements, mechanisms and networks as well as the role they can play in the enforcement of competition law, particularly for young competition agencies in different jurisdictions. The report focuses on informal cooperation, including recent development and specific cases by region, and provides insights into future trends in regional and international cooperation.

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Introduction

1. As part of the ongoing UNCTAD project on international cooperation in competition policy, the Intergovernmental Group of Experts on Competition Law and Policy, in its thirteenth session which was held from 8 to 10 July 2013, requested the UNCTAD secretariat to prepare a report on informal cooperation on specific cases among competition agencies.

2. Previous UNCTAD reports on international cooperation have stressed informal cooperation among competition authorities as a tool for effective enforcement of competition laws. Along with leniency programmes, informal cooperation may be a valuable asset in the portfolio of tools available for the enforcement of competition law.[1] Experience also shows that even in situations where competition agencies have formal agreements with each other, informal exchange of ideas and developments on past cases, as well as possible areas where competition concerns may arise, is common.

3. Cooperation is a key ingredient to effective enforcement of competition law. It allows agencies to augment resources, reduce costs of regional studies, enhance training and promote mutual understanding of competition regimes, thereby contributing to building trust. However, the nature of antitrust and merger control poses serious challenges for competition authorities. These challenges include the legislative and structural architecture of formal cooperation agreements; lack of coherence between national and regional frameworks; information access bottlenecks, especially in developing countries; resources constraints; and timing and procedural issues (UNCTAD, 2013).

4. A recent survey conducted by the Organization for Economic Cooperation and Development (OECD) identified the following constraints and limitations of formal cooperation in competition cases (OECD, 2013):

(a) Limitations on confidential information sharing;

(b) Limitations caused by differences in legal frameworks in relation to criminal and civil enforcement;

(c) Institutional and investigatory impediments: resource constraints and practical difficulties;

(d) Jurisdictional constraints: differences in legal standards;

(e) Lack of trust and confidence in legal systems.

5. The OECD survey also reports that the bulk of international cooperation takes place among developed competition agencies, with an emerging pattern of informal cooperation among young competition agencies.

6. This report reviews the challenges faced by young competition agencies in dealing with both domestic and cross-border anticompetitive cases and in putting in place effective cooperation mechanisms. Developed and developing competition agencies alike have been seeking ways and means of enhancing the process of enforcement cooperation and the sharing of best practices. This report focuses on the emergence and proliferation of informal cooperation, draws on recent research and international reports, for instance

[1] For instance, when Brazilian Government authorities were confronted with the same problem in their investigations into the vitamin cartel, Canada's informal cooperation offered leads on what exactly to investigate, thus demonstrating the effectiveness of informal networks.

UNCTAD background studies for the eleventh (2011), twelfth (2012) and thirteenth (2013) sessions of the Intergovernmental Group of Experts on Competition Law and Policy, among others, and ongoing and past work published by the main organizations dealing with the subject, such as the European Union, the International Competition Network (ICN), OECD and academia. The report also draws from the UNCTAD Questionnaire to Competition Agencies (2013–2014).[2]

I. Framing the issue

A. What is informal cooperation?

7. Cooperation is defined as a "situation in which people work together to do something".[3] Within the present report, the working definition of informal cooperation takes into account general and informal cooperation applied to institutional activities of competition authorities. Cooperation refers to collaboration between competition authorities aimed at creating synergies as well as partnerships for mutual assistance and reciprocity in enforcing their respective competition rules.

8. Cooperation in cross-border anticompetitive cases falls into two categories: formal and informal. Although informal cooperation is a continuous process and can take place in many settings, this report will focus on informal cooperation mechanisms between competition agencies. In this regard, informal cooperation is defined as unofficial, casual, daily, friendly and unconstrained collaboration between competition agencies.

9. The report covers informal cooperation taking place outside the established legal arrangements as described in formal bilateral and regional trade agreements (RTAs). However, it also reviews informal cooperation that takes place within the framework of formal agreements to a certain extent. Responses to the UNCTAD questionnaire cited the example of close cooperation in a merger case[4] between the German competition authority and competition authorities from Asia and Europe that led to the withdrawal of a merger notification.

B. Complementarities and limitations of formal and informal cooperation

10. As explained in TD/B/COM.2/CLP/21/Rev.5, paragraph 23 below, the exchange of confidential information is a limitation of both formal and informal cooperation agreements:

> The maintenance of informal links with other competition authorities has been an important way of keeping informed of developments in competition law and policy in other jurisdictions through the exchanging of views, although the usefulness of such informal cooperation has sometimes been found to be limited in cases where an authority requires enforcement assistance in a particular matter, or confidential information.

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[2] The following respondents answered the UNCTAD questionnaire: Barbados Bhutan, Brazil, Chile, Colombia, Croatia, Egypt, the European Union, Germany, India, Japan, Kenya, Malta, the Republic of Moldova, Namibia, Peru, Switzerland, Turkey, Uruguay, the United States of America and Zimbabwe.

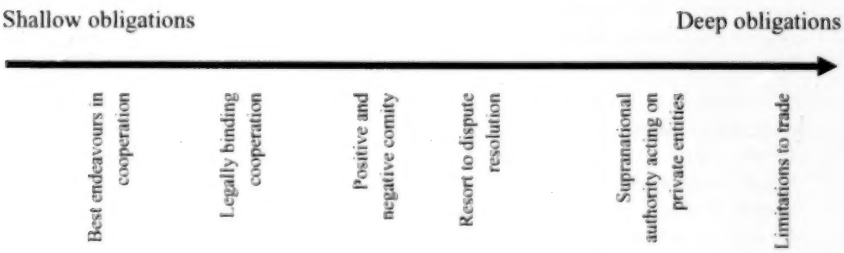
[3] See http://www.learnersdictionary.com/definition/cooperation (accessed 22 April 2014).

[4] See the BHP/RIO Tinto case at http://ec.europa.eu/comm/competition/mergers/cases/index/m99.html#m_4985 (accessed 22 April 2014).

11. While the conclusion of bilateral enforcement cooperation agreements is necessary for full cooperation to take place, enforcement cooperation might initially take place on an informal basis. Useful information may be exchanged informally as well as through most bilateral cooperation instruments (with the exception of mutual legal assistance treaties and agreements relating to the International Antitrust Enforcement Assistance Act, such as the one concluded between the United States and Australia). Cooperation would be facilitated by the initiation of informal discussions and exchanges of general information, including within the framework of any bilateral agreements or RTAs (see figure and table 1) to which the countries concerned may be party.

12. Despite the proliferation of formal agreements observed over the last two decades, an UNCTAD study underlines that implementation has been slow, especially in developing countries. Trade and competition negotiators might have been "eager to ink" but not ready to act (UNCTAD, 2005). Formal cooperation agreements come with legal and institutional requirements that must be fulfilled in order to operate. They come in what is called "hard law", with rules, regulations and dispute-settlement mechanisms. These may take years to put in place, which is true of many RTAs in Africa, Latin America and other parts of the world. The pace has been extremely slow and their effectiveness can be queried.

The spectrum of competition provisions in regional trade agreements



Source: UNCTAD, 2005, Executive summary.

Note: This is illustrative only: Actual positioning would depend upon specific wording in the agreements.

13. Within regional or subregional groupings, political will or relative uniformity of economic development and culture may make it easier to build mutual trust and perception of common interests, which may be viewed within the context of the overall relationship rather than solely in terms of competition law and policy. Enforcement cooperation among developing countries with limited experience in this area, but facing similar circumstances, may also be of a more balanced nature than cooperation with countries with more experience in this area and would also constitute a learning experience, ensuring that cooperation with more advanced partners is fruitful.

14. With few exceptions,[5] most countries prohibit their competition agencies from sharing confidential information obtained in the course of an investigation. While

[5] Australia has a statute under which confidential information can be shared with foreign competition agencies for use in civil cases (Mutual Assistance in Business Regulation Act 1992). The Canadian

protecting the rights of the parties, this also limits the degree of cooperation among competition agencies. Public dissemination of such information could prove harmful to the firm that provided it, to the future information-gathering efforts of the agency and to consumer welfare. The cooperation challenges facing competition agencies is how to promote better understanding of each other's laws and ensure effective enforcement, while protecting legitimate private and public interests.

Table 1

Number of regional trade agreements that contain competition clauses involving developing countries signed with the European Commission or the United States

	European Commission		*United States*		*Developing countries*	
	Number	*%*	*Number*	*%*	*Number*	*%*
Number of regional trade agreements with developing countries containing competition provisions notified to the World Trade Organization	8	72	3	75	24	46
Total number of known regional trade agreements with developing countries notified to the World Trade Organization	11	100	4	100	52	100

Source: UNCTAD, 2005, chapter 4, Lessons from the negotiation and enforcement of competition provisions in South–South and North–South RTAs, p. 129.

15. However, informal case-specific cooperation could actually involve the exchange of intelligence and agency information related to the know-how in case approach, the different strategies used, the way to define better the relevant market and other items that cannot be referred to as such in formal cooperation agreements. Informal cooperation will come to a halt when both agencies receive the companies' authorization to cooperate formally. That would mean that the competition authorities depend on the consent of a third party.

C. Types of informal cooperation arrangements

16. UNCTAD 2013 identified certain types of informal cooperation arrangements.[6] In informal cooperation, there are instruments for case-specific cooperation mechanisms, while others are general in nature. Some national competition authorities have developed informal networking relationships and have built a level of trust, where competition officials can request case information by telephone without basing it on formal agreements. Networking forums are also emerging in many regions, such as, the Euro Mediterranean Competition Network and the African Competition Forum. For the purposes of this study, two elements of informal cooperation have been differentiated: general informal

competition authorities have conducted a consultation process on a legislative proposal that includes an amendment to permit the sharing of confidential information in some circumstances.

[6] (a) Informal cooperation based on the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980); (b) informal cooperation based on the 1995 Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, commonly known as the 1995 OECD Recommendation on Cooperation, or other similar soft-law instruments with no particular legal basis; (c) cooperation based on waivers; (d) cooperation based on provisions in national law; (e) cooperation based on non-competition-specific agreements and instruments; (f) cooperation based on competition-specific agreements; (g) regional cooperation instruments.

cooperation arrangements and case-specific informal cooperation mechanisms. These are described below:

(a) General informal cooperation can take place in conferences, bilateral meetings and other forms of exchange of knowledge and information that can be shared between competition experts in the course of their deliberations. Also, capacity-building and technical assistance cooperation may provide the platform where beneficiary countries can get together and promote common objectives. In this regard, UNCTAD, OECD and ICN are engaged in this type of informal cooperation through their contributions to multilateral, regional and bilateral meetings.

(b) Case-specific informal cooperation could include discussion of investigation strategies, market information and witness evaluations. It would also entail sharing leads and comparing authority approaches to common cases. This form of cooperation can help young competition authorities in particular to streamline an investigative strategy and focus an investigation.

17. While these two informal cooperation mechanisms cover all types of anticompetitive behaviour (cartel, abuse of dominance and mergers), different approaches to informal cooperation arrangements are being used in cartel and merger cases. Information sharing in cartel cases is more limited due to the nature of its content and the fear that it might be used against the parties concerned. In merger cases, information is readily shared because in many instances such information is not likely to be utilized to the detriment of the parties concerned.

18. Cooperation on anticompetitive practices affecting more than one country are among the international measures provided for in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, negotiated under the auspices of UNCTAD. The OECD Recommendation on Merger Review (2005) also stresses the importance of cooperation and coordination in reviewing transnational mergers.

19. Working together by collecting and sharing information specific to cross-border competition cases and exchanging views on appropriate methodologies, approaches and remedies in such cases are alternative ways in which informal cooperation has been deepened between competition agencies of developing and developed countries; informal cooperation can also facilitate the work of agencies and reduce business costs.

20. One of the objectives of the UNCTAD advisory services to young competition agencies is to provide capacity-building in case-specific informal cooperation exchanges, which in many cases is critical for enforcing competition laws in a fair and transparent manner. UNCTAD prioritizes activities that promote mutual understanding and contribute to building trust to enhance informal cooperation arrangements.

21. Both types of informal cooperation mentioned above have proved to be of increasing importance in the last decade, especially in regions where formal agreements exist but have not yet been enforced or where they do not yet exist. In cases where procedures are little formalized, it leaves room for greater flexibility in designing the mode of cooperation and its implementation.

22. UNCTAD voluntary peer reviews have also contributed to informal cooperation efforts among competition agencies, including cross-pollination between young and mature competition agencies. An appreciated feature of the UNCTAD voluntary peer reviews is the assessment of regional competition arrangements such as the West African Economic and Monetary Union (WAEMU) and its member States, and the tripartite peer review for the United Republic of Tanzania, Zambia and Zimbabwe within the Southern African Development Community (SADC) and the Association of Southeast Asian Nations (ASEAN) (Indonesia and the Philippines). The two peer review reports (WAEMU and

comparative assessment report for the tripartite peer review), their respective recommendations and the follow-up capacity-building activities highlight appropriate areas where inter-agency cooperation can be most useful for reforms and the adoption of best practices.

II. Review of specific cases by region

23. Responses to the UNCTAD questionnaire indicate that informal cooperation between competition agencies has been taking place in many jurisdictions across the globe. The table below shows informal cooperation efforts by region based on the countries that responded to the questionnaire. It is essential to note that the analysis does not illustrate a regional dimension of informal cooperation.

Table 2
Informal cooperation by region

Region	*Regional cooperation (percentage)*
Africa	100
Americas	86
Asia	67
Europe	86

Source: Response to the UNCTAD Questionnaire to Competition Agencies (2013–2014).

24. The following section is a review of specific cases classified by region and type of anticompetitive practice (cartel or anticompetitive mergers) and provides a summary of the informal cooperation activities of member States beyond their participation and engagement in worldwide networks such as OECD and ICN.

A. Africa

Informal cooperation in merger cases

25. Based on the responses to the UNCTAD questionnaire, many of the cases relate to merger control. The case of Zimbabwe exemplifies cooperation mostly with the competition authority of Zambia. In two examples of merger transactions notified separately to the two authorities, they exchanged information during case examination involving major soft-drink companies[7] and tobacco companies.[8] This exchange of information enabled the two competition authorities to make well-informed determinations on the transactions. Moreover, Zimbabwe and Zambia collaborated informally while assessing the takeover of a South African company by an Indian company.[9]

26. This cooperation is clearly case specific and took place under the umbrella of the Common Market for Eastern and Southern Africa. The COMESA Treaty has one of the most comprehensive competition-related provisions and corresponding institutional

[7] Coca-Cola and Cadbury-Schweppes merger. See http://www.apeccp.org.tw/doc/Australia/Case/aucas16.htm (accessed 25 April 2014).

[8] Rothmans of Pell-Mall and British American Tobacco merger. See siteresources.worldbank.org/INTCOMPLEGALDB/.../AlexKukuba.pd ((accessed 25 April 2014).

[9] Cipla Medpro South Africa (Pty) Limited and Cipla India case. See www.mcser.org/journal/index.php/mjss/article/viewFile/1980/1979 (accessed 25 April 2014).

framework.[10] As the COMESA Competition Commission develops its case work load, it can be expected that informal cooperation will take place between its member States based on the provisions of the COMESA Treaty and the Competition Rules and Regulations.

27. Zimbabwe's questionnaire response indicates that it has also been working informally with other countries such as Burundi, Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan and Swaziland.

28. This shows that informal cooperation is increasingly becoming an integral part of competition enforcement in the COMESA region, with more established competition agencies taking the lead.

Informal cooperation on ex-post enforcement activities

29. Zimbabwe has recently received valuable market structure information on the bread cartel case (from the Competition Commission of South Africa), the public utilities (electricity) monopolization case (competition authorities of Botswana, Zambia, and Namibia), and the molasses abuse of dominance case (competition authorities of South Africa, Namibia and Zambia). It has also supplied information on investigations carried out by the Zambian Competition and Consumer Protection Commission on the cement and motor industries.

30. Two factors are considered to hamper enforcement of competition laws in WAEMU: first, the psychological difficulty to accept the court's opinion rendering exclusive competence to the WAEMU Commission, and, second, the need to adapt national legislations to regional rules (UNCTAD, 2013). UNCTAD is implementing a three-year technical assistance project with the WAEMU Commission to address these issues and facilitate cooperation and exchange of information.

31. In SADC, work on informal cooperation among competition agencies has been initiated under the Competition and Consumer Policies Committee, which promotes consultations and cooperation on competition and consumer protection issues. Further, an online data bank was established in 2012 to facilitate the exchange of non-confidential information on ongoing and closed competition cases. Member States have posted summaries of specific cases, but there is no provision for reporting instances of informal cooperation.

32. However, the South African Competition Commission has been making efforts to involve other SADC member States in recent cartel cases concerning the fertilizer, maize seed and construction industries, among others. Various factors have hindered the extent to which countries can engage in informal cooperation in the region, for examples, differences in legal frameworks, which do not provide for adequate powers to organize dawn raids, or the absence of leniency programmes or provisions on the exchange of information on cartel cases. The same applies to merger cases where different and sometimes conflicting remedies designed by different agencies make harmonization and cooperation difficult.

B. Asia

33. In East and South-East Asia, the ASEAN Free Trade Area and the Asia–Pacific Economic Cooperation (APEC) forum do not include competition provisions in trade

[10] See UNCTAD, 2005, chapter 11, Allocation of competences between national and regional competition authorities: The case for COMESA. See also UNCTAD 2008 and 2011a

agreements; therefore, informal cooperation at the regional level is not possible. However, APEC is very active in the area of competition and in 1996 established the Competition Policy and Deregulation Group – now called the Competition Policy and Law Group – to improve the region's competitive environment and develop an understanding of regional competition laws and policies. Training courses and experience sharing are examples of APEC activities and can be considered general informal cooperation.

34. Another regional forum in East Asia is the East Asia Top-Level Officials' Meeting on Competition Policy. Nine annual meetings have been held since 2005; the latest was held in Manila in August 2013. This forum aims to build a network among competition agencies in East Asia by sharing views and perspectives on competition policy, with attendance of the top-level officials from these agencies. The forum discusses the challenges faced by these officials when enforcing competition law in their respective jurisdictions and future technical assistance strategy to be developed among them. Although it lacks the functions of a cooperation mechanism, general informal cooperation is taking place indeed, and agencies are increasingly taking part in this forum every year. Case-specific informal cooperation has not yet been envisaged in this forum, but perhaps a trust-building exercise would advisable to lay the groundwork for informal cooperation in the East Asia subregion.

C. Countries of the Commonwealth of Independent States

35. The Interstate Council for Antimonopoly Policy (ICAP) of the Commonwealth of Independent States (CIS) has been the basic formal platform for interaction of the antimonopoly authorities of those States for the past 20 years. It was established in 1993[11] to coordinate the formulation of the legal and organizational basis for the enforcement of competition law in CIS countries. This was aimed at the prevention, restriction and suppression of anticompetitive practices and unfair competition within the CIS Common Economic Zone.

36. According to the Russian competition authority, ICAP has made several achievements. It has reduced the number of antimonopoly law infringements on the international markets of the CIS countries, developed competition both in the domestic markets and in external economic activities, and eliminated barriers in the movement of goods and services within the CIS Common Economic Zone. Its work has reached a new qualitative level. To increase the interaction between the antimonopoly authorities of the CIS countries, ICAP participants decided to conduct joint investigations of anticompetitive practices in CIS international markets such as air transportation.

37. The competition authorities of Belarus, Kazakhstan and the Russian Federation, members of the Eurasian Economic Community, are engaged in formal and informal cooperation mechanisms such as the adoption of a model law for competition in July 2013 as part of the Agreement on Common Principles and Rules of Competition of 9 December 2010. The implementation of this model law, a legislative act of an advisory nature, will be a benchmark for the legislative work in competition policy in these three largest CIS countries. The UNCTAD secretariat has been actively involved and is fully committed to

[11] ICAP includes representatives of 10 CIS member States: Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, the Republic of Moldova, the Russian Federation, Tajikistan, Uzbekistan and Ukraine. See the Treaty on Implementation of the Coordinated Antimonopoly Policy (23 December1993) and the new Treaty on Implementation of the Coordinated Antimonopoly Policy signed at the meeting of the Council of the Heads of the CIS Governments in Moscow on 25 January 2000.

this work. The Russian Federation and Kazakhstan were engaged in informal cooperation in dealing with cases in the mobile telephone services market.[12]

38. Armenia, the Republic of Moldova and Ukraine have observer status within the Eurasian Economic Community. The Competition Council of the Republic of Moldova is part of ICAP and the Central European Free Trade Agreement. The Moldovan competition authority works closely with ICAP, which allowed the authority to launch a common market investigation in the food retail industry, petrol products and the pharmaceutical industry.

39. In addition, the Moldovan competition authority was involved in case-specific informal cooperation arrangements in a recent case related to Green Card Car Insurance, in which it requested the expertise of the Austrian competition authority. Another case was an alleged violation of the midstream and downstream petrol market, where the Moldovan competition authority and the Russian Federation worked together. Finally, the Moldovan competition authority requested and received the expertise from its Romanian counterpart on the alleged abuse of a dominant position of a Moldovan enterprise. Overall, informal cooperation has helped the Competition Council of the Republic of Moldova deal with competition cases.

40. The Federal Antimonopoly Service (FAS) of the Russian Federation is actively involved in informal cooperation forums such as the Working Group for Research on Competition Issues in the Pharmaceutical Sector, which was set up in January 2012 on the initiative of FAS and the Italian competition authority. Another informal setting is the International Working Group on Investigating Issues on Pricing at the Oil Product Markets and Methods of Their Functioning which was established on the initiative of FAS and the Austrian competition authority in October 2011.

41. With regard to case-specific informal cooperation, FAS reported consultations with foreign competition authorities while investigating international cartel cases, especially with the competition authorities of Norway and Viet Nam.[13] Consultations were also held with the Directorate-General for Competition of the European Commission on case investigations of the markets of pharmaceutical products and automobiles. Recently, FAS and the Directorate-General for Competition initiated a joint investigation on the ocean- and sea-borne container liner shipping case. During this investigation, the two parties held joint consultations.[14]

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[12] In early 2010, the antimonopoly bodies of Kazakhstan and the Russian Federation launched investigations on roaming services. The investigations were completed in October 2010. Based on the findings, FAS determined that MTS OJSC, VympelCom OJSC, and MegaFon OJSC had abused their market dominance, and the Agency for Competition Protection of Kazakhstan arrived at the same conclusions with regard to GSM Kazakhstan LLP, Kazakhtelecom OJSC, Mobile Telecom-Service LLP, and KaR-Tel LLP.

[13] In a similar fish cartel case concerning the supply of pangasius from Viet Nam to the Russian market, FAS carried out an investigation with the active support of the competition authority of Viet Nam. The case was initiated against a number of Russian companies, and the Association of Production and Trade Enterprises of the Fish Market, a non-commercial organization, prohibited the coordination of economic activities by market agents. FAS suspects that the Association coordinated such activities of economic entities – competitors, dividing up the pangasius market between themselves.

[14] Response of the Russian Federation to the UNCTAD questionnaire.

D. Latin America and the Caribbean

42. In Latin America, formal subregional groupings (the Andean Community, the Central American Competition Network and MERCOSUR) have created informal cooperation systems between their respective members. However, a number of factors within these subregional groupings hinder the potential of informal cooperation. The Latin American Competition Forum, the Inter-American Competition Alliance[15] and the Regional Competition Centre for Latin America have been instrumental in enhancing informal cooperation efforts.

43. The UNCTAD programme, Competition and Consumer Protection for Latin America (COMPAL), is the only regional network composed of competition and consumer protection authorities in the region. It has contributed extensively to building the foundations for all types of cooperation between its members since 2003. In addition, the Latin American Working Group on Trade and Competition, the Latin American and Caribbean Economic System and UNCTAD contribute to strengthening institutions by sharing knowledge and promoting regional consultations.

44. Within the Caribbean Community (CARICOM), the Treaty of Chaguaramas incorporated competition provisions to create a competition culture and contribute to the growth of CARICOM States under a single-market arrangement. Under this umbrella, formal and informal cooperation take place regularly between its members and with the CARICOM Competition Commission when handling cross-border anticompetitive practices within the Community. However, CARICOM law presents some challenges related to the differences between the legal systems of CARICOM member States and the allocation of competences between itself, the Council for Trade and Economic Development, the Caribbean Court of Justice and national competition authorities.

45. The Barbados competition authority, the Fair Trading Commission, is an active participant in ICN, which fosters and builds informal cooperation mechanisms for its members. Barbados also reported its commitment to CARICOM by occasionally hosting officers from other agencies of CARICOM member States. The Commission, which has offered to assist other CARICOM member States that have not yet established a national agency, has reported a fruitful working relationship with the United States Federal Trade Commission, sharing information on specific cases.

46. According to its response to the UNCTAD questionnaire, the Brazilian competition authority CADE considers international cooperation to be a key ingredient of effective case investigation as a means of solving day-to-day problems in its prosecution work.

47. To promote informal cooperation, Brazil has engaged successfully with advanced competition authorities such as the United States Department of Justice and the Directorate-General for Competition of the European Commission. An example of such joint efforts are the simultaneous dawn raids in the hermetic compressors for refrigeration case (2009). Examples of other cases of international mergers that involved cooperation with other competition authorities and coordination of remedies are available in competition enforcement circles.[16]

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[15] Spanish-language forum for all competition agencies in the Americas, which operates through monthly conference telephone calls to share experiences.

[16] In the Munksjö and Ahlstrom merger case, a waiver of confidentiality model was developed to grant both parties full access to relevant information. Before granting the waivers, the authorities discussed previous cases, market conditions and methodology used to study specific markets. After the waivers were granted, concerns about the merger were shared, as well as market findings and information

48. Benchmarking studies were carried out with the assistance of sister agencies such as the United States Department of Justice, FAS and the Directorate-General for Competition in the following sectors in Brazil: the airline industry, shopping centres and pharmaceuticals.

49. From 2010 to 2011, Brazil and Chile cooperated informally in a merger application in the air transport sector. Chile benefited from cooperation regarding the definition of the relevant market as well as remedies aimed at rationalizing the new market structure resulting from the merger.

50. Chile prosecuted an international cartel involving the leading companies in the hermetic compressors market (Whirlpool S.A. and Tecumseh do Brasil Ltda) for having engaged in price-fixing agreements. Informal cooperation proved to be effective in dealing with jurisdictional issues related to the products manufactured in Brazil and imported to Chile, and vice versa. Finally, the notification to companies outside Chile was made through a judicial mechanism between countries known as international exhort, for which Chile received the assistance of the Brazilian judicial authorities. In this case, Chile avoided the international exhort, which is a lengthy process that could have undermined the short administrative timelines provided in its competition law.[17]

51. In the review of the aforementioned cases of informal cooperation, it can be concluded that different types of information were indeed exchanged between the authorities in different regions of the world. Clearly, this type of informal cooperation has contributed to solving specific case problems faced during investigations. The problems were related to the following points:

(a) Definition of the relevant markets;

(b) Economic and legal analysis applied to the identification of risks or the proof of an illegal offence;

(c) How the remedies were applied.

52. The above review also indicates that informal cooperation is an effective and necessary tool for enforcing competition law at the national, regional and international levels. It allows competition agencies to make better use of scarce resources and adopt remedies that can restore competition with minimum burden on business.

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given by the party. Cooperation was critical, since assets were in Europe, and both authorities had access to more and better information, such as the number of competitors and clients. When designing the remedies, the communication focused on coherence in both countries, addressing competition concerns raised by both authorities.

[17] In a recent merger case, the Nestlé and Pfizer merger, Chile evaluated the implications of the international merger of these multinational companies and established that the transaction would have produced a significant concentration in the Chilean nutritional market, especially in the baby dairy products market. The competition authority of Chile held a number of meetings with foreign authorities, mainly in Latin America, to identify the relevant market, the economic analysis applied in each country and the measures implemented to mitigate the problem. Informal cooperation with the Mexican competition authority facilitated significantly the analysis of the Chilean case. The importance of the exchange of case information was critical because the Pfizer factory was located in Mexico, and the sale of this asset was of particular relevance to the remedies proposed in Chile.

III. Informal cooperation: What works?

A. Usefulness

53. The replies to the UNCTAD questionnaire reaffirms that it is of paramount importance for young competition agencies to foster both types of informal cooperation: general and case-specific informal cooperation. In this regard, it is worth mentioning the usefulness of informal cooperation as a core day-to-day activity of any competition agency. For example, the response of the United States Department of Justice and the United States Federal Trade Commission to the questionnaire states the following:

> (…) Enforcement cooperation is a key means both of improving the effectiveness of individual agency investigations and producing consistent outcomes in similar circumstances, and informal cooperation has developed into an important tool for achieving those goals. With over 120 competition agencies around the world and with many transactions subject to concurrent or sequential review by multiple agencies, there is a serious risk that reviews will lead to inconsistent results that are not justified by differences in market conditions, or that different approaches will lead to a situation in which the most restrictive jurisdiction effectively sets the rules for all jurisdictions. Informal cooperation is an extremely useful tool for working together, at the practical level in helping agencies to resolve individual cases effectively and efficiently to avoid these risks. Informal cooperation also provides us and our counterparts with a better understanding of one another's policies and practices, which has helped to promote convergence around consensus best practices.

B. Challenges

54. To achieve the full potential of informal cooperation on particular case-specific cooperation, young competition agencies need to tackle a number of challenges:

(a) Lack of resources to participate in subregional, regional and international conferences, meetings and training workshops;[18]

(b) Lack of interaction and trust between young enforcers and more mature ones that leads to see a small group of agencies regularly cooperating with each other: "Lack of prior interaction between agencies and lack of trust, for example, affect the willingness of enforcers to co-operate with each other, and limit effective co-operative relationships to a small group of agencies which regularly engage in cooperation" (OECD, 2013).

(c) Many young competition agencies have limited capacity to absorb the general informal cooperation activities that other relatively advanced competition agencies can provide them;

(d) What constitutes confidential information in case-specific informal cooperation settings and what does not?

(e) Timing issues. In merger cases, some firms choose to notify and obtain resolutions from certain jurisdiction before notifying other jurisdictions. This, and differentiated review timing can affect agencies' ability to cooperate effectively. The latter

[18] To some extent, international assistance from development partners and advanced competition authorities has contributed to solve this problem. UNCTAD research points out that resource and capacity constraints are perhaps among the most significant problems facing competition authorities in developing economies. Political will and support to national competition authorities are also factors. See UNCTAD (2011b).

can be even more difficult when there is a difference in procedural rules, such as deadlines in each country, sometimes resulting in issues relating to time coordination in cases involving non-cooperation by the parties concerned. In such instances, each country has to gather various documents to secure the legal procedure and time frame, which can be a serious constraint to informal cooperation.

C. New generation of informal cooperation among young agencies

55. Many young agencies responding to the questionnaire indicated that they had devoted their scarce resources to strengthen informal cooperation with other agencies, particularly with those of neighboring countries. In this context, informal cooperation is considered to augment resources and enhance effective enforcement of competition laws.

56. Given that the thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy decided to include in its work "informal international cooperation that could lead to, and be done in parallel with, formal cooperation",[19] the UNCTAD secretariat has actively promoted and supported informal cooperation initiatives among competition authorities in ways that address the day-to-day concerns of young competition authorities (UNCTAD, 2014).

57. As a response to challenges posed by cross-border anticompetitive practices, it was proposed during the thirteenth session of the Intergovernmental Group of Experts that enforcement capabilities be aggregated. One way to achieve this could be through the creation of a focused multinational information-sharing platform. Key features of the platform could include the pooling of resources to create a visible flow of non-confidential information and enhance enforcement.

58. Under this platform, which was designed by UNCTAD in 2013, each jurisdiction would log information, for example on past and ongoing cartel and merger investigations, and market studies. Such a platform would enable information gathering and sharing and would facilitate collaboration in ongoing investigations. The benefits of the platform would include reduced enforcement fragmentation, enhanced agency effectiveness and deterrence. The databank would also contribute to capacity-building, learning and informal ad hoc cooperation.

59. In July 2013, the UNCTAD secretariat launched the *Database on Competition Cases* during a COMPAL meeting in Lima, Peru. It has been praised by various regional groupings and member States, notably Colombia, Chile and Peru (see box below), WAEMU and CIS countries, who intend to use it.

60. The recently adopted Lima Declaration (see box) is a new generation of informal cooperation among young agencies that will deepen their collaboration and knowledge of each other's laws, practices and cases.

[19] The twelfth session of the Intergovernmental Group of Expert, held in July 2012, examined the current features of international cartels and cross-border merger control in developing countries and countries with economies in transition. The challenges faced by these countries in competition law enforcement in these areas were also examined, while areas for cooperation were suggested. During the round table entitled "Cross-border anticompetitive practices: The challenges for developing countries and economies in transition", the director of the University of Oxford Centre for Competition Law and Policy described factors pertaining to international competition law enforcement and touched upon the enforcement realities in developing countries and countries with economies in transition.

The Lima Declaration: Informal cooperation among neighbors – Colombia, Chile and Peru

In connection with the thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy, the heads of the competition authorities of Colombia, Chile and Peru in July 2013 discussed ways in which an informal platform for the exchange of experiences could be developed, taking into account day-to-day constraints and the need for competition agencies to view this type of cooperation as a necessity rather than a burden.

After several rounds of negotiations, the heads of the three competition authorities and UNCTAD signed the Lima Declaration during the OECD Latin American Competition Forum in September 2013. The main provisions of this instrument of informal cooperation are as follows:

(a) Creation of a platform for the exchange of experiences and training among the competition agencies of Chile, Colombia and Peru. Specific aims are as follows:

(i) To share experiences gained from enforcing their respective laws;

(ii) To conduct studies and research on topics of interest for all of the agencies;

(iii) To take steps to improve the level of integration of the agencies by means of periodic informal meetings, taking into consideration the timing of international and regional forums;

(b) Since the signing of the Lima Declaration, the three competition authorities and UNCTAD have met regularly to exchange views and strategies on the enforcement of competition law in cases of mutual interest and identify potential cross-border enforcement actions. This new cooperation arrangement complements and builds on the existing bilateral formal agreements for cooperation between the Peruvian competition authority (INDECOPI) and the National Economic Prosecutor's Office of Chile. A similar channel of communication exists between Mexico and Peru for the exchange of general information on a procedure involving both countries.

Source: http://www.programacompal.org/declaracion-lima-2013.html.

61. Another way of encouraging young competition agencies to engage in more informal cooperation is by sharing knowledge and expertise on how to manage their respective administrative procedures to improve efficiency and allow access to tools applied by other competition agencies in the investigation of cases.

62. Young competition agencies can move from general informal cooperation to a more sophisticated case-specific one by exchanging case intelligence between them as they develop experience and expertise. Indeed, one of the recommendations of the Intergovernmental Group of Experts aimed at enhancing informal cooperation between young competition authorities and those in developed countries was the establishment of an international intelligence network built on the trust and knowledge of peer-competition authorities (UNCTAD, 2012). In the long run, as young agencies build expertise and capabilities, they will attract more leniency applications from cartelists. In this connection, capacity-building programmes help younger competition authorities scale up anti-cartel enforcement in handling cases (UNCTAD, 2012).

IV. The future of informal cooperation

63. International cooperation on competition issues has been on the agenda of UNCTAD and other international organizations for several decades. With the increasing globalization of economic activities comes the daunting task of dealing with cross-border mergers and

anticompetitive practices, including international cartels. The cross-border aspect of competition law enforcement remains a challenge, especially to young competition agencies, which often face financial and human resource constraints. These challenges clearly underscore the need for collaborative enforcement between competition agencies to ensure that anticompetitive practices do not cancel out the benefits of well-functioning markets.

64. During the thirteenth session of the Intergovernmental Group of Experts meeting, a number of best practices to strengthen informal cooperation among competition agencies were suggested, based on the experiences of member countries and institutions. Of these, it is important to emphasize the following:

(a) Promoting better understanding of each other's laws, assessment criteria and design of remedies and sanctions so as to promote transparency in procedures, processes and design. An example of this best practice is being implemented through the signatories of the Lima Declaration, which could lead to the development of appropriate solutions to legal limitations, particularly by young competition agencies;

(b) Building human and technical capacities of young competition agencies to enforce competition law by:

(i) Developing capacity-building programmes such as the COMPAL Global Programme of UNCTAD, as well as other initiatives such as the establishment of regional training centres in Mexico, Hungary and the Republic of Korea; and information-sharing networks such as the African Competition Forum and the activities of other regional integration groupings;[20]

(ii) Exchanging staff and/or detaching resident advisers to promote mutual understanding and trust;

(c) Developing guidelines and best practices for cooperation agreements based on what works and what does not;

(d) Ensuring the inclusion of provisions in national laws allowing for cooperation and exchange of information for enforcement purposes;

(e) Establishing and implementing clear safeguards for due process and the protection of confidential information.

[20] COMESA, SADC, ASEAN Working Group on Competition, CARICOM, WAEMU, CIS and the Euro-Asia Platform.

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